

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MIKESHIA MORRISON, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

ESURANCE INSURANCE CO., a foreign
automobile insurance company,

Defendant.

Case No. 2:18-cv-01316-TSZ

**DEFENDANT ESURANCE INSURANCE
CO.'S SURREPLY TO STRIKE
PURSUANT TO LCR 7(g)**

I. RELIEF REQUESTED

Pursuant to Local Rule 7(g), Defendant Esurance Insurance Co. ("Esurance") respectfully requests that the Court strike the following material, which is improper new evidence and argument in a reply:

- Plaintiff's Reply in Support of Plaintiff's Motion for Class Certification, Appointment of Class Counsel and Appointment of Class Representatives (Dkt. #69) at ECF page 5, line 20 through ECF page 6, line 2 and at ECF page 6, line 19 through ECF page 6, line 21.

- The Declaration of Daniel A. Rogers in Support of Plaintiff's Reply in Support of Plaintiff's Motion for Class Certification, Appointment of Class Counsel and Appointment of Class Representatives (Dkt. #70).
- Exhibit A to the Declaration of Daniel A. Rogers in Support of Plaintiff's Reply in Support of Plaintiff's Motion for Class Certification, Appointment of Class Counsel and Appointment of Class Representatives (Dkts. #68-1, #68-2, #70-1).

In the alternative, Esurance requests leave to file a Surreply of up to five (5) pages to respond to the new arguments and evidence.

II. ARGUMENT

Esurance seeks to strike new argument and evidence introduced for the first time in Reply, which goes beyond the scope of Plaintiff's Motion for Class Certification, Appointment of Class Counsel and Appointment of Class Representative (Dkt. #57).

Plaintiff's Motion attempted to satisfy her burden of showing that class certification is proper based on: (1) limited evidence regarding the circumstances and claims of Plaintiff and **four proposed class members**, and (2) opinions of counsel about counsel's belief that Esurance had a uniform practice of denying claims based on MMI. (*See* Dkts. #57 at 9-10; #59 at 3; #59-6). Defendant challenged the sufficiency of that proof in Defendant's Opposition to Plaintiff's Motion for Class Certification, and moved to strike the improper opinions of counsel. (*See* Dkt. #63 at 23-25; *see also id.* at 11 n.6, 13-15.)

Plaintiff's Reply introduces substantial new evidence to try to satisfy the elements of Fed. R. Civ. P. 23(a) and 23(b)(3), including PIP benefit letters for **94 proposed class members** (totaling 151 pages of new evidentiary material). (Dkts. #68-1; #68-2, #69 at pp. 5:20-6:2, 6:19-21, #70, #70-1.)

New arguments and evidence are not permitted in reply. *See Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006) (Zilly, J.) ("It is well established that new arguments and evidence presented for the first time in Reply are waived.") (citation omitted).

1 That Esurance's Opposition pointed out Plaintiff's failure to make the required showing to
 2 support class certification does not authorize Plaintiff to introduce substantial new evidence with
 3 her Reply and try again to make that showing. Esurance has not had the chance to address
 4 Plaintiff's new material, and thus would be prejudiced by its consideration.

5 Accordingly, the above-listed new materials related to 94 proposed class members should
 6 be stricken or, at the very least, Esurance should be given leave to file a Surreply of up to five (5)
 7 pages to respond to the new arguments and evidence.

8 **III. CONCLUSION**

9 For the foregoing reasons, the Court should strike the new evidence and argument
 10 submitted in connection with Plaintiff's Reply in Support of Plaintiff's Motion for Class
 11 Certification, as described above, or give Esurance leave to file a Surreply to address those new
 12 materials.

13 DATED this 23rd day of September, 2019.

14 FOX ROTHSCHILD LLP

15
 16 By /s/ Gavin W. Skok
 17 Gavin W. Skok, WSBA #29766
 18 1001 Fourth Avenue, Suite 4500
 19 Seattle, WA 98154
 Telephone: (206) 624-3600
 Facsimile: (206) 389-1708
 Email: gskok@foxrothschild.com

20
 21 By /s/ Patrick M. Fenlon
 22 Patrick M. Fenlon (*pro hac vice*)
 23 Campbell Mithun Tower – Suite 2000
 24 222 South Ninth Street
 Minneapolis, MN 55402
 Telephone: 612-607-7000
 Facsimile: 612-607-7100
 Email: pfenlon@foxrothschild.com

25 Attorneys for Defendant Esurance Insurance Co.

CERTIFICATE OF SERVICE

I certify that I am a legal administrative assistant at the law firm of Fox Rothschild LLP in Seattle, Washington. I am a U.S. citizen over the age of eighteen years and not a party to the within cause. On the date shown below, I caused to be served a true and correct copy of the foregoing on counsel of record for all other parties to this action as indicated below:

| <u>Service List</u> | |
|--|--|
| Duncan C. Turner, WSBA #20597 Daniel A. Rogers, WSBA #46372 BADGLEY MULLINS TURNER PLLC 19929 Ballinger Way NE, Suite 200 Seattle, WA 98155 Telephone: (206) 621-6566 Facsimile: (206) 621-9686 dturner@badgleymullins.com drogers@badgleymullins.com jbates@badgleymullins.com <i>Attorneys for Plaintiff</i> | <input type="checkbox"/> Via US Mail <input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> Via CM/ECF / Email <input type="checkbox"/> Via over-night delivery |
| Randall C. Johnson, Jr., WSBA #24556 LAW OFFICE OF RANDALL C. JOHNSON, PLLC P.O. Box 15881 Seattle, WA 98115 Telephone: (206) 890-0616 rcjj.law@gmail.com <i>Attorneys for Plaintiff</i> | <input type="checkbox"/> Via US Mail <input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> Via CM/ECF / Email <input type="checkbox"/> Via over-night delivery |
| Ryan C. Nute, WSBA #32530 LAW OFFICE OF RYAN C. NUTE, PLLC 19929 Ballinger Way NE, Suite 200 Seattle, WA 98155 Telephone: (206) 330-0482 ryan@rcnutelaw.com <i>Attorneys for Plaintiff</i> | <input type="checkbox"/> Via US Mail <input type="checkbox"/> Via Messenger <input checked="" type="checkbox"/> Via CM/ECF / Email <input type="checkbox"/> Via over-night delivery |

1 I declare under penalty of perjury under the laws of the United States that the foregoing is
2 true and correct.

3 Executed on this 23rd day of September, 2019 in Seattle, Washington.

4
5 
6 Courtney R. Tracy